SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 296

OTIS EVANS, TRADING AS OTIS EVANS TRUCK LINE,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

Filed June 25, 1946

Comes now Otis Evans, trading as Otis Evans Truck Line, appellant herein, who having been allowed an appeal from the United States District Court for the Western District of Virginia by a specially constituted three-judge court under Title 28 U. S. C. A., Section 47, to the Supreme Court of the United States, herewith and hereby presents this statement disclosing the basis upon which the Supreme

Court of the United States has jurisdiction upon such appeal to review the order from which said appeal is taken.

The above-named appellant in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above-entitled cause and the order of the District Court denying the plaintiff's prayer for a preliminary injunction, and the final decree dismissing the plaintiff's complaint in said cause, respectfully represents:

I. Statute Sustaining Jurisdiction

The statutory provision believed to have sustained jurisdiction is Title 28, Section 47(a) of the United States Code, and particularly the following provisions thereof:

"A final judgment or decree of the District Court in cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

"Appeals to the Supreme Court under this section and Section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that Court."

II. United States Statute, the Enforcement, Operation and Execution of Which Is Sought to Be Enjoined

Section 206(a) of the Interstate Commerce Act, as amended, of the Motor Carrier Act of 1935, 49 U. S. C. A., Section 306(a), known as the "Grandfather Clause", Part Two of the Interstate Commerce Act.

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III. The Date of Decree and Application for Appeal

The order of the aforesaid District Court denying the plaintiff's prayer for an interlocutory injunction and its refusal to set aside and annul the order of the Interstate Commerce Commission, dated October 1, 1945, denying the plaintiff's application and application as amended before the Court, and the final order of said Court dismissing plaintiff's complaint was entered and dated March 30, 1946, and the application for appeal herein was presented May 30, 1946.

IV. The Nature of the Case, Rulings of the Court, and Substantial Questions Involved

The appellant appends hereto a copy of the opinion of the special three-judge court delivered in this cause together with the Court's findings of fact and conclusions of law.

Respectfully submitted,

Rutledge C. Clement,
R. Paul Sanford,
Counsel for Appellant.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT DANVILLE, MARCH —, 1946

Before: The Honorable Armistead M. Dobie, United States Circuit Judge; The Honorable John Paul, United States District Judge, and The Honorable A. D. Barksdale, United States District Judge

Civil Action No. 145

OTIS EVANS, T/A Otis Evans Truck Line, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

OPINION

BARKSDALE, J.

This is an action instituted by the plaintiff, Otis Evans, trading and doing business as Otis Evans Truck Line, against the United States of America and the Interstate Commerce Commission, under the authority of 28 U. S. C. A., Sections 41 (28), 46, 47, and 48, to set aside and annul an order of the Interstate Commerce Commission dated March 29, 1945, denying plaintiff's application for a certificate as a motor carrier which he sought under the authority of the "grandfather clause" of Section 206 (a) of the Interstate Commerce Act as amended, 49 U. S. C. A., Section 306 (a). With regard to this case, the pertinent language of the "grandfather clause" is as follows:

> ". . . *Provided, however,* That subject to section 210, if any such carrier . . . was in bona fide operation as a motor carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue such certificate without requiring further proof that public

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convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, . . ."

History of the Case

On February 1, 1936, the plaintiff filed his timely application for a certificate under the "grandfather" clause, accompanied by affidavits of certain shippers, seeking authority to transport by motor vehicle a variety of commodities over irregular routes between a number of shipping points in various states. After informal proceedings, a so-called "compliance order" was issued by the Commission dated May 12, 1938, granting authority to transport certain commodities between shipping points in certain specified territory. A protest being filed, certain additional evidence was presented informally by applicant, a further informal conference was held with him, and another compliance order dated March 20, 1939, was issued, granting wider authority to the plaintiff, although excluding certain commodities included in the prior order. On April 28, 1941, a certificate of public convenience and necessity was issued to the applicant by the Commission. On October 8, 1941, applicant, by his attorneys, filed a petition praying for a vacation of the certificate of April 28, 1941, and that he be granted a much more comprehensive certificate, alleging that he had always been entitled to more comprehensive rights, but that through ignorance and lack of counsel he had not insisted on as much as he was entitled to. By order of July 20, 1942, the Commission cancelled the certificate of April 28, 1941, and set down for hearing the applicant's petition for broader rights. A hearing was had before Examiner McCaslin in Winston Salem, N. C., on April 28-29, 1943, at which the applicant and his counsel and certain protestants and their counsel were present, and evidence was taken. A further hearing was held before Examiner Yardley at Winston Salem, N. C., on November 4, 1943, at which the applicant and his counsel and certain

protestants and their counsel were present, and evidence was taken.

On January 19, 1944, Examiner Yardley made his report and recommended that the applicant be granted a certificate under the "grandfather clause" authorizing the transportation of certain commodities between certain points. The applicant filed exceptions to this report, and on March 29, 1945, Division 5 of the Commission filed a very comprehensive report or opinion finding

> ". . . that applicant has failed to establish the right to a certificate under the 'grandfather' clause of section 206 (a) of the Interstate Commerce Act, authorizing operations, in interstate or foreign commerce, as a common carrier by motor vehicle of any of the commodities between the points claimed in the amended application, and that the application should be denied."

An order was entered carrying out the findings of Division 5. Plaintiff then filed a petition before the entire Commission for review of the decision of Division 5, which was denied on October 1, 1945. Shortly thereafter, this action was instituted, and the effective date of the Commission's order denying a certificate to plaintiff has been deferred from time to time by the Commission's orders, pending hearing, which was held at Lynchburg on March 14, 1946.

The United States, in its answer, raised the question of venue, but this contention was withdrawn at the bar of this court upon the assurance of plaintiff's counsel that the plaintiff was a resident of this District.

Also at the bar of this Court the plaintiff, by counsel, although not conceding the correctness of its conclusions, admitted that the determination by the Commission of his rights as to transportation of numerous commodities between various shipping points, was final, and not reviewable by this Court, and therefore withdrew all claims asserted in plaintiff's petition except his claims for authority to transport—

> "*Wool in Bags or Bales, Greased and Scoured*
>
> "From Philadelphia to Spray and Leaksville, North Carolina.

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"New Furniture

"From Stoneville, North Carolina, to New York, New York, Oxford and Philadelphia, Pennsylvania, East Rutherford and Camden, New Jersey.

"Wool in Bales or Bags, Wool Waste and Clippings, Wool Yarn in Bales and Wool Floss.

"From Philadelphia, Manayunk, and Bridgeport, Pennsylvania, and Camden, New Jersey, to Leaksville and Spray, North Carolina."

Plaintiff, by counsel, contends that the action of the Commission in denying him a certificate for the transportation of the commodities named above between the said shipping points, is arbitrary and without evidence to support it, as it is his contention that all the evidence in the case establishes this right. The defendants urge that a consideration of all the evidence demonstrates that the action of the Commission was fully justified.

APPLICABLE LEGAL PRINCIPLES

In the consideration of the rather narrow issue here presented, certain well established legal principles should be borne in mind.

As the Motor Carrier Act is remedial, and the "grandfather" clause confers a special privilege, this privilege should be extended only to carriers plainly within its terms. An applicant seeking the benefits of the "grandfather" clause is required to show compliance with all the statutory requirements. *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83, *Akin* v. *United States*, 62 F. Supp. 391, 396. The burden of establishing his right to the statutory grant is upon the applicant. *Alton Railroad* v. *United States*, 315 U. S. 15, 25, *Ready Truck Lines* v. *United States*, 42 F. Supp. 970, 972, affirmed *per curiam*, 314 U. S. 580. It is the function of the Commission, and not of the Court, to pass upon the weight and credibility of evidence. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 484, 490, *Alton Railroad Co.* v. *United States, supra, Virginia Stage Lines* v. *United States*, 48 F. Supp. 79, 83.

"With regard to judicial review of the decisions and orders of the Commission, it is well settled that the court's function is exhausted where there is found to be a rational basis for the conclusions reached by that administrative body. *Massachusetts Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 54 S. Ct. 692, 78 L. Ed. 1260, *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147."

Virginia Stage Lines v. *United States, supra*, 82.

THE EVIDENCE

Although the applicant has now withdrawn his claims for transportation rights as to all commodities except wool and new furniture between certain points, it is nevertheless right and proper to consider all the evidence in the record in order to see the case in its proper perspective. The oral testimony of the applicant and his witnesses is generally vague and indefinite. As to his documentary evidence, it is euphemistic to say that many irregularities appear therein. Indicia of actual alteration of documents are numerous. The following few examples are illustrative:

Certain so-called check stubs, actually memoranda originally attached to checks of Chatham Manufacturing Company, Elkin, N. C., showing the account for which the check was drawn and detached by the applicant as payee, were introduced by him as proof of shipments, as "Exhibit 27" in the record. One of them bears the date, "May 22, 1934," obviously placed thereon by a rubber stamp. The Assistant Secretary of this Company testified, "We never rubber stamped checks as to date." A similar stub bears the notation, "Invoice 10/5/34." On the same document, the figure "4" appears in the first line. The same witness testified that the two figures "4" were made by different typewriters. The second "4" is so different from the first "4" that the difference clearly appears from an inspection of the photostatic copy appearing in the record before us.

With regard to certain bills of lading introduced by the applicant to show shipments to Mount Airy Furniture Company, at Mount Airy, N. C., one of the partners of this firm testified that a bill of lading bearing date February

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27, 1934, showed the number "14794," while another bill of lading dated exactly one year later, February 27, 1935, showed the number "14787," that is, seven numbers smaller than the bill of lading dated the previous year. This witness testified that they numbered their bills of lading consecutively, and therefore the later bill of lading should have borne a number much larger than the earlier one. He said that, in his opinion, it would not be possible for a bill of lading issued a year earlier than a later one, to bear a larger number. The same witness testified that in these bills of lading there appeared duplicates of Ticket No. 16185, one of them dated September 22, 1934, and the other one dated September 22, 1935. Being identical in all other respects, it is obvious that the date of one was changed in order to provide proof of two shipments.

The same witness testified that amongst these bills there was one which showed a shipment of furniture on January 30, 1935, to Michigan Furniture Company, although his company's records showed that, "That shipment was not made by us." This witness also testified that, amongst these bills, one showed a shipment by his company to Hecht Brothers, Baltimore, on February 22, 1935. The witness testified that no such shipment appeared at any time between December 21, 1934, and March 1, 1935.

A witness, J. W. Scott, Shipping Clerk of Mount Airy Chair Company, Mount Airy, N. C., testified that the records of his company showed no shipments handled by applicant for his company in 1935, although applicant had introduced certain freight bills of lading showing shipments hauled for this company in that year. As to Bill No. 1, No. 5979, bearing date "2/16/35," introduced into the record by the applicant, the witness found in his files carbon copy, No. 3, bearing the same identical number "5979," which was dated "12/16/36." The two copies were identical in every particular except the date.

The same witness discovered while on the witness stand that the "No. 1" original of Bill No. 5984, bearing date February 16, 1935, introduced by the applicant, was identical in every respect except the date with the "No. 3" carbon copy in the witness' file which bore the date of December 16, 1936.

The applicant introduced bills of lading showing shipments of new furniture from Stoneville, N. C., to northern points. He listed 16 shipments of such furniture in 1934, 15 in 1935, 17 in 1936, 10 in 1937, 14 in 1938, and 16 in 1939, a total of 88. Of these bills of lading, 31 bore the following stamp:

> "This shipment is tendered and received subject to the terms and conditions of the company's uniform bill of lading effective June 15, 1941.
>
> ——— ———,
> Agent's Signature."
>
> ——— ———,
> Shipper's signature.

The obvious strangeness of this is that shipments which purported to have moved during the years 1934-1939 should bear a stamp which could not conceivably have been in existence prior to June 15, 1941. An agent of the shipper testified that his company had never possessed such a stamp, and certainly did not place any such stamp on these bills. The applicant admitted possession of such a stamp, but denied any knowledge of how or by whom the stamp was placed on the bills. The only explanation suggested by applicant's counsel is that someone might have put this stamp on the bills thoughtlessly or as a prank. In the light of clear evidence of alteration of other documents, it would seem more reasonable to suppose that the shipments actually moved subsequent to June 15, 1941, and the prior dates were later inserted by the applicant or someone for him, as it appeared that the bills had always been in the possession of the applicant, his former attorney, or the Commission.

The instances just mentioned by no means constitute a complete summary of irregularities and inconsistencies: others of a similar character also appear in the record.

As to the commodities to which plaintiff still contends he should be granted transportation rights, the situation seems to be as follows:

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Wool

Although applicant presented some evidence to substantiate his claim for "grandfather" rights to the transportation of wool, it appears that applicant's first mention of wool in the record is in his affidavit filed with the Commission on March 6, 1939, and is as follows:

> "10. Changes in operations or interruptions in service, if any: Prior to June 1, 1935, and until about a year ago, applicant also transported several commodities including wool, for other motor carriers. The wool was transported from Philadelphia, Pa., to Leaksville, N. C. Applicant participated in the solicitation of some of this traffic, but payment of the transportation charges was made to other carriers, who in turn compensated the applicant for the transportation services actually rendered by him. About a year ago applicant began transporting wool from Philadelphia, Pa., to Leaksville and Elkin, N. C., as a service rendered direct for the shippers. It is the contention of applicant that inasmuch as he was transporting wool prior to June 1, 1935, and continuously since that date, he is entitled to a 'grandfather' right to transport wool from Philadelphia, Pa., to Leaksville and Elkin, N. C. He, therefore, desires this part of his operation to be considered along with those described in paragraph 8 hereof as constituting his 'grandfather' operations."

It is obvious from this statement that, at the critical date, June 1, 1935, any transportation of wool then engaged in by applicant was for other motor carriers, and it is well settled that hauling by one motor carrier for another does not create multiple "grandfather" rights. Both carriers cannot claim credit for such shipments. As to such shipments as mentioned in applicant's affidavit, the carrier who controlled the shipments and who was responsible to the shippers and the public, was entitled to credit, and not this applicant. *Thomson* v. *United States,* 321 U. S. 19. It was well within the province of the Commission to accept the above quoted affidavit of the applicant at its face value.

Although the applicant has now withdrawn his claim for the right to transport wool to Elkin, N. C., it is interesting to note that he asserted such a claim before the Commission and introduced evidence of numerous shipments of wool hauled by him during the years 1934 and 1935 to Chatham Manufacturing Company at Elkin, N. C. However, this was thoroughly discredited by the evidence of an official of that company that their records showed no shipments of wool whatever hauled by the applicant during the years 1934 and 1935.

It is our conclusion that the evidence amply justified the action of the Commission in denying the applicant's claim of the right to transport wool, as asserted by him.

NEW FURNITURE

The applicant also introduced some evidence tending to support his claim for "grandfather" rights in the transportation of new furniture from Stoneville, N. C., to northern points. This evidence consisted of oral testimony, and certain bills of lading tending to show that the applicant was hauling new furniture from Stoneville to northern points at and before the critical date of June 1, 1935.

However, the oral testimony is quite vague and indefinite. As to the bills of lading, it has been heretofore mentioned that, of the 88 bills covering the period 1934-1939, 31 were questionable for the reason that they bore the stamp referring to the date of June 15, 1941. Applicant's counsel contends that, even if the 31 questioned bills should be disregarded, the remaining bills constitute uncontradicted evidence upon which "grandfather" rights should have been granted by the Commission. We do not agree. In the first place, it is a well recognized principle that, where a fact-finding body is satisfied that a witness has wilfully testified untruthfully in one particular, it may disregard his entire evidence. Here, the Commission would be fully justified if it concluded that 31 of these bills of lading had been wilfully altered. Besides, there is ample evidence of alteration of other documents adduced by the applicant.

But even if the 31 questionable bills of lading be simply disregarded, in our opinion the Commission would be justi-

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fied in denying applicant's claim based upon the remaining bills of lading covering new furniture. If the 31 questioned bills should be eliminated, there would remain only bills showing 12 shipments in 1934, 8 in 1935, 11 in 1936, 6 in 1937, 8 in 1938, and 12 in 1939. It would be entirely within the province of the Commission to hold that shipments, so few in number, constitute only evidence of intermittent, sporadic or infrequent service, and fall short of proof of the "bona fide operation" mentioned in the statute, with its connotation that such service must be substantial and continuous. *United States* v. *Carolina Freight Carriers Corp., supra, Peninsular Corporation &c.* v. *United States,* 60 F. Supp. 174, *Watson Brothers &c.* v. *United States,* 59 F. Supp. 762, *Beasley* v. *United States,* 42 F. (2d) 468.

CONCLUSION

The record before us discloses that the plaintiff began trucking in a small way in 1931. On the critical date of June 1, 1935, he owned and operated one tractor-trailer unit and one straight truck. Upon his application, supported by his own statements and *ex parte* affidavits of others, he was granted temporary "grandfather" rights, and on April 28, 1941, he was granted a fairly comprehensive "grandfather" certificate. Not being satisfied with this, he petitioned the Commission to cancel this certificate and grant him more extensive rights. This led to hearings and the taking of evidence, upon which, in our opinion, the Commission was fully justified in denying him any "grandfather" rights at all. That the Commission fully and fairly considered plaintiff's claims, clearly appears from the report of Division 5, filed March 29, 1945, and later approved by the full Commission.

It therefore follows that an order will be entered affirming the order of the Commission and dismissing the complaint at plaintiff's costs.

I concur in the foregoing opinion.

JOHN PAUL,
District Judge.

March 22, 1946.

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OCTOBER TERM, 1946

No. 296

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO AFFIRM FILED BY APPELLEES

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BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO AFFIRM FILED BY APPELLEES

The appellant, pursuant to Rule 7, Paragraph 3, of the Rules of the Supreme Court of the United States, moves that the motion to affirm filed by the appellees be overruled and that this case be set for hearing on its merits.

This is a direct appeal from the final decree dated March 30, 1946, of a specially constituted district court of three

judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission.

The Commission's order, dated March 29, 1945, denied appellant's application for a certificate as a motor carrier under the "grandfather clause" of Section 206 (a) of the Interstate Commerce Act as amended (49 U. S. C. 306 (a).

The issue arising on this appeal is whether the Commission's order is supported by substantial evidence, and it is submitted by the appellant that the Commission's order was not supported by substantial evidence and the District Court's order is erroneous.

The appellant further submits that the motion to affirm should be overruled because the appeal does present a substantial question and the only way that this Court can determine whether or not the evidence presented to the Commission was insufficient to justify the Commission in granting the appellant a certificate is for the case to be heard on its merits.

History

The history of the application before the Interstate Commerce Commission is fully set forth by the District Court in its opinion, designated as "appendix" to the statement as to jurisdiction filed in this cause. Appellant, for brevity, adopts this statement of the District Court as the history of the case, with the exception of the statement of the District Court with reference to the overruling of the appellant's petition to the entire Commission for a review of the decision of Division Five and states that the Court correctly stated this portion of the history but appellant desires to enlarge on this portion of said statement, as will appear later in this brief.

Evidence

The original application filed by appellant and subsequent amended applications included a large number of specific commodities to be transported in certain designated territories. When this case was argued before the three-judge special court at Lynchburg on March 14, 1946, appellant by counsel, although not conceding the correctness of the Commission's conclusions, admitted that the determination by the Commission of his rights as to the transportation of numerous commodities between various shipping points was final and not reviewable by the Court and thereupon withdrew all claims asserted in the petition filed in the District Court except his claims for authority to transport:

> "*New Furniture*
>
> "From Stoneville, North Carolina, to New York, New York, Oxford and Philadelphia, Pennsylvania, East Rutherford and Camden, New Jersey.
>
> "*Wool in Bales or Bags, Wool Waste and Clippings, Wool Yarn in Bales and Wool Floss*
>
> "From Philadelphia, Manayunk, and Bridgeport, Pennsylvania, and Camden, New Jersey, to Leaksville and Spray, North Carolina.
>
> "*Wool in Bags or Bales, Greased and Scoured*
>
> "From Philadelphia to Spray and Leaksville, North Carolina."

Therefore, the only question to be determined on this appeal is whether or not the Commission's order as to the commodities above named between said shipping points is supported by substantial evidence or that its action in denying the appellant a certificate covering the above com-

modities between the said shipping points was arbitrary or without evidence to support it.

New Furniture

The evidence submitted in support of the appellant's rights to transport this commodity between the points set forth above consists of affidavits of shippers, bills of lading or freight receipts and the testimony of witnesses at the two formal hearings, the first at Winston-Salem, North Carolina, on April 28 and 29, 1943, before Examiner McCaslin and the second at Winston-Salem, North Carolina, before Examiner Yardley, on November 4, 1943. At the second hearing, there was no testimony for the appellant and neither was there any testimony introduced by the protestants with reference to the new furniture between the points mentioned herein. Division Five, in its report and recommended order, which was subsequently adopted by the full Commission, and the order of the full Commission likewise was affirmed by the District Court, eliminates new furniture between the shipping points then and now requested because out of a total of 88 bills of lading that were exhibited, covering shipments from Stoneville, North Carolina, to northern points from the year 1934 through the year 1939, 31 bore the following stamp:

> "This shipment is tendered and received subject to the terms and conditions of the company's uniform bill of lading effective June 15, 1941.
> Shipper's signature. Agent's signature."

A list of these bills of lading was filed with the testimony of the appellant and is marked "Exhibit No. 1." All of the bills which bore this stamp were on shipments moving from Stoneville, North Carolina, to Brooklyn, New York, and Oxford, Pennsylvania. The bills of lading indicating

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shipments to other points did not bear this stamp. By reference, however, to "Exhibit No. 1," it will be noted that the number of bills of lading bearing the stamp was small in comparison with the bills that did not bear the stamp and there was abundant evidence to show that the appellant was engaged in the transportation of furniture from Stoneville, North Carolina, to the points indicated, prior to June 1, 1935, and continuously thereafter, the bills bearing the stamp eliminated. The appellant could not explain how or why this stamp appeared on the bills of lading. He denied any knowledge of the transaction and, unfortunately, the bills were assembled by Mr. Dickerson, his bookkeeper, who testified at the first hearing and was excused before any question was raised as to these bills of lading and could not be located at the time of the second hearing due to the fact that he was a member of the Armed Forces of the United States, holding a captain's commission. The attorney, Mr. Floyd Osborne, who also assisted in the preparation of the list and the assembling of the bills of lading, was a member of the Armed Forces of the United States and he could not be produced as a witness. Appellant says that the Commission was in error to disregard these bills of lading that bore the stamp because an examination of same will show that the dates of the bills of lading were filled in in the handwriting of the person signing same, namely Miss B. Hopper; that the same color of lead appears through each of the bills; that there were no alterations or erasures appearing thereon. To substantiate the bills of lading which bore the stamp, Mr. R. S. Foley, Manager of the Stoneville Furniture Company, Stoneville, North Carolina (Tr. 106), was called as a witness and he identified the person signing the bills as Miss Hopper and testified that the signature appeared to be hers. He

further testified as follows, supporting appellant's application to transport new furniture (Tr. 107):

By Mr. Estes:

"Q. What company are you connected with?

"The Witness: Stoneville Furniture Company, Stoneville, North Carolina.

By Mr. Price:

"Q. How long have you been with that company?

"A. Since September 3, 1933.

"Q. Have you had charge of the office and manufacturing end all during this period of time?

"A. Yes.

"Q. I will ask you before I go into these bills of lading, has Mr. Evans been hauling furniture for you from Stoneville, North Carolina, to points in Philadelphia, New York and northern points, and northern points and eastern points since 1934?

"A. Since March, 1934.

"Q. Was he hauling through 1934, 1935 and 1936, along through there?

"A. Yes, sir.

(Tr. 109)

"Q. Mr. Foley, here is one bearing date 10-23-34, Oxford, Pennsylvania, and from that time until now Mr. Evans has been hauling new furniture for Stoneville Furniture Company?

"A. Yes.

"Q. Hauling it to northern and eastern points?

"A. Yes, sir."

In addition to the bills of lading shown on the list identified as "Exhibit No. 1," the applicant, now appellant, filed a list of bills of lading which is attached to the petition filed with the Commission on January 5, 1942, requesting the Commission to reopen, reconsider and vacate the certifi-

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cate issued April 28, 1941 (certified record beginning at page 30. The lists referred to begin at page 85 of the certified record.) The shipments on these lists, which were exhibited to the District Supervisor, Mr. Raymond, apparently show 98 additional shipments of new furniture that moved to the northern points mentioned above from Stoneville, North Carolina, that were not considered by Division Five in its report and not referred to in the opinion of the District Court. Division Five in its report also apparently overlooked the list filed as "Exhibit No. 1," covering shipments from Stoneville, North Carolina, to Brooklyn, New York, Philadelphia, Pennsylvania, Oxford, Pennsylvania, and East Rutherford, New Jersey, beginning with the year 1940 through December 19, 1942. This list, a part of "Exhibit No. 1," was filed to show the continuity of the operation. The list shows that there were 112 shipments moving from Stoneville, North Carolina, to Brooklyn, New York, 104 shipments from Stoneville to Philadelphia, Pennsylvania, 32 shipments from Stoneville to Oxford, Pennsylvania, and 50 shipments from Stoneville to Newark, New Jersey.

Wool in Bags or Bales, Greased and Scoured

From Philadelphia to Spray and Leaksville, North Carolina.

Wool in Bales or Bags, Wool Waste and Clippings, Wool Yarn in Bales and Wool Floss

From Philadelphia, Manayunk, and Bridgeport, Pennsylvania, and Camden, New Jersey, to Leaksville and Spray, North Carolina.

The Commission, adopting the report of Division Five, eliminates these commodities apparently on the theory that there was only documentary proof of this operation to

1939, when in fact exhibit 19 (page 132 of the certified record) plainly shows movements through 1942, or up to the date of the first hearing. Exhibit 15 (page 124 of the certified record), exhibit 16 (page 128 of the certified record) and exhibit 19 (page 132 of the certified record) show a list of shipments of these commodities from 1934 through 1942 between the points set forth above and, in addition thereto, the list filed with the District Supervisor at Charlotte shows movements of these commodities in the requested territory from 1934 to the date of the conference (pages 68 and 69 of the certified record).

In addition to the bills of lading, there were a number of affidavits filed and received by the Commission and also supported by the testimony of Captain Dickerson (T. 30). Captain Dickerson was an employee of Marshall Field and Company, in charge of the Karasten Rug Mill, at Leaksville, North Carolina, and had also been connected with the Bedspread Mill of Leaksville. At the second hearing, Mr. Sheffield, an employee of Marshall Field and Company, at Spray, North Carolina, testified that the appellant did not transport wool from northern points to the mill with which he was connected (Tr. 149). Attention is directed to the testimony of the witness Sheffield, as it will appear that his evidence is not in any way contradictory of the testimony of the appellant, his witnesses or the bills of lading filed in support of his application. The appellant did not produce any proof, nor has he ever contended that he transported wool, etc., to or for Marshall Field and Company, of Spray, North Carolina. The records examined by Mr. Sheffield were the records of Marshall Field and Company, Spray, North Carolina, and not the records of the Bedspread Mill, Leaksville Woolen Mills or Karasten Rug Mill. It is confusing because the towns of Leaksville and Spray are very close together and the Bedspread Mill and the Karasten

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Rug Mill at Leaksville are subsidiaries of Marshall Field and Company. Captain G. C. Dickerson testified (Tr. 27-30) that he was an employee of Marshall Field and Company from 1934 to the date that he entered the service of the United States and had charge of the Bedspread Mill and Karasten Rug Mill and he also had a connection with the Leaksville Woolen Mill; that the applicant, appellant, moved wool, wool waste, yarn and floss from northern points to these mills from 1934 through 1941.

Legal Principles Involved

The appellant is conscious of the narrow issue here presented and the proper scope of judicial review of the Commission's orders. In the case of *Interstate Commerce Commission* v. *Union Pacific Railway Company,* 220 U. S. 541, 547 (1912), the Supreme Court there stated the general principle that orders of the Interstate Commerce Commission should not be set aside by the court if they are within the Commission's statutory powers and are supported by substantial evidence. Also, in the case of the *United States* v. *Carolina Freight Carriers Corporation,* 315 U. S. 475, 484, 490, this Court held that it is the function of the Commission and not of the court to pass upon the weight and credibility of the evidence. An applicant for a motor carrier certificate under the "grandfather clause" has the burden of establishing the existence of the facts entitling him to the certificates sought. *Alton Railway Company* v. *United States,* 315 U. S. 15, 25 (1942).

Argument

The Commission in this case, and also the District Court, has denied the appellant all of the operating rights sought under the authority of the "grandfather clause" of Section 206(a) of the Interstate Commerce Act as amended.

The pertinent language of the "grandfather clause" applicable to this case is as follows:

> "• • • *Provided, however,* That subject to section 210, if any such carrier • • • was in bona fide operation as a motor carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, • • • the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect. • • •"

It is undisputed that appellant filed a timely application for a certificate under the "grandfather clause" and submitted affidavits of certain shippers, etc., and later presented bills of lading to the District Supervisor for inspection and filed with the District Supervisor a list of the bills of lading showing shipments of the commodities that had been transported in the territory wherein operating rights were being sought. Without going into all of the steps followed by the appellant, it is deemed sufficient for the purpose herein to mention the fact that the applicant, appellant, at the time that he first started transporting commodities by motor vehicle from Stoneville, North Carolina, to northern points, did not keep a proper record of the shipments transported by him as he, like other carriers at the time, did not think it necessary. The bills of lading submitted in support of his operating rights were supposed only to be representative and not to include, by any means, or cover the volume of the movements of freight. The applicant, appellant, is without education and can do very little more than write his name and he had to depend upon

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others to assemble the bills of lading, shippers' receipts, etc., in order to support his application. It is submitted that the evidence in this case, as a whole, plainly shows that the applicant was in bona fide operation as a common carrier of special commodities on June 1, 1935, and continuously thereafter until the time of the first hearing in this case, at which time the evidence was closed. The evidence shows that the applicant, appellant, held himself out as a common carrier over irregular routes and continuously solicited business. However, it does appear that he was overly ambitious in his request for transportation rights and did not present sufficient proof to enable him to obtain all of the authority sought.

It is conceded that evidence, in the form of bills of lading, was presented in connection with shipments to Elkin, North Carolina, and Mounty Airy, North Carolina, which made it evident that he was not entitled to authority to transport new furniture from Mount Airy, North Carolina, or to transport wool from northern points to Elkin, North Carolina. The spurious evidence introduced in the form of certain bills of lading in connection with the operations to these points has resulted in the Commission's disregarding all other evidence presented and caused it to enter an order denying to the applicant, appellant, all of the operating rights sought. It is submitted that the Commission would have been amply justified in refusing to consider any of the evidence introduced if this had been an application for a certificate of public convenience and necessity requiring not only proof of the need for the operation but of the fitness of the applicant to conduct such operation. The fitness of the applicant to conduct an operation under the "grandfather clause" is not considered, but the *sole question is whether or not the applicant was in bona fide operation on June 1, 1935, and continuously thereafter.*

The Commission completely disregarded all of the documentary evidence introduced as evidence by appellant as to the transportation of furniture and wool in the territory wherein operating rights were sought when four witnesses other than appellant, namely: C. F. Wells, employee of Stoneville Furniture Company (Tr. 47), W. D. Bondurant (Tr. 57), Curtis W. Evans (Tr. 59) and R. S. Foley, Manager of Stoneville Furniture Company (Tr. 107), testified positively that the applicant transported furniture from Stoneville, North Carolina, to the points mentioned herein from 1934 continuously to the date of the first hearing, and there was absolutely no evidence to the contrary other than the bills of lading that bore the stamp mentioned on page four of this brief. It appears to the appellant that it is inconceivable for anyone to think that he would have produced bills of lading in support of operating rights that had been altered in order to bring same within the critical period when the bills so altered bore a stamp which could not have been in existence prior to 1941. The stamp is very noticeable and could have been seen by anyone handling the bills of lading. It is, therefore, submitted that the action of the Commission in rejecting all of appellant's evidence introduced, supporting the transportation of new furniture, was arbitrary and that the order denying all operating rights was not based on any evidence or upon substantial evidence.

Wool, Etc.

In addition to bills of lading that were filed in support of the appellant's application to transport this commodity from northern points heretofore designated to Leaksville and Spray, North Carolina, he also submitted the affidavits of H. A. Morson, Manager of Leaksville Woolen Mills, not connected with Marshall Field and Company, the testimony of Captain G. C. Dickerson (Tr. 27) and the testimony of

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James A. Taylor (Tr. 42), all of which show that the applicant was engaged in the transporation of wool from Northern points to the Karasten and Bedspread Mills, also Leaksville Woolen Mills, from 1934 continuously to the date of the first hearing at Winston-Salem. The appellant, in his testimony (Tr. 91), emphatically stated that he had hauled wool from 1934 continuously to the date of the first hearing for himself and not for others.

It is, therefore, submitted that the action of the Commission in denying the appellant authority to transport wool, etc., from northern points to Leaksville and Spray, North Carolina, was arbitrary and based entirely upon the fact that applicant, in his ignorance, signed an affidavit before the District Supervisor Raymond at Charlotte on the 6th day of March, 1939, wherein it appeared that he may have been hauling wool for other carriers in 1934 and 1935.

The overwhelming weight of the evidence introduced shows that the appellant was engaged in the transportation of new furniture north and wool, etc., south on June 1, 1935, and continuously thereafter.

Wherefore, the appellant respectfully submits that the motion to affirm filed by appellees should be overruled and this case set for hearing by the Court on its merits.

RUTLEDGE C. CLEMENT,
Danville, Virginia,
R. PAUL SANFORD,
Danville, Virginia,
Counsel for Appellant.

In the District Court of the United States for the Western District of Virginia

CIVIL NO. 145

OTIS EVANS, T/A OTIS EVANS TRUCK LINE,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree dated March 30, 1946, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. Petition for appeal was apparently filed on May 30, 1946, and order allowing appeal filed on June 17, 1946, and certain appeal papers were served on June 3, 1946.[1]

[1] Copies of petition for appeal, notice of appeal, and assignment of errors were served on June 3, 1946; order allowing appeal was served on June 19, 1946; and jurisdictional statement and statement directing attention to paragraph 3 of Rule 12 were served on June 28, 1946.

The Commission's order dated March 29, 1945, denied appellant's application for a certificate as a motor carrier under the "grandfather clause" of Section 206 (a) of the Interstate Commerce Act as amended (49 U. S. C. 306 (a)). Appellees submit that the appeal presents no substantial question, and that the decree of the District Court should be affirmed.

The only question arising on this appeal [2] relate to the weight of the evidence. Not only is it a well-established principle that the burden of proof is upon the applicant [3] and that the determination of the weight and credibility of evidence is an administrative function entrusted to the Commission and not to the reviewing court,[4] but the record

[2] No specific issues are set forth in plaintiff's assignment of errors or statement of points to be relied upon.

[3] *Alton Railroad Company* v. *United States*, 315 U. S. 15, 25; *Gregg Cartage Company* v. *United States*, 316 U. S. 74, 83; *Akin* v. *United States*, 62 F. Supp. 391, 396 (W. D. La., 1945), aff'd March 11, 1946.

[4] *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 484, 490; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156, 158; *B. & O R. R. Co.* v. *United States*, 298 U. S. 349, 359; *Merchants Warehouse Company* v. *United States*, 283 U. S. 501, 508; *C. R. I. & P. Railway* v. *United States*, 274 U. S. 29, 33–34; *Assigned Car Cases*, 274 U. S. 564, 580; *Loving* v. *United States*, 32 F. Supp. 464, 467 (W. D. Okla., 1940), aff'd 310 U. S. 609; *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 410 (D. Del., 1943); *Fish Transport Company, Inc.* v. *United States* (D. Mass.), decided December 22, 1944. In *Wright* v. *United States*, 50 F. Supp. 758 (W. D. N. C., 1943), the court upheld the Commission's decision in a case involving spurious documentary evidence. The rule that it is for

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in the case at bar discloses that, as stated in the District Court's opinion, "The oral testimony of the applicant and his witnesses is generally vague and indefinite. As to his documentary evidence, it is euphemistic to say that many irregularities appear therein. Indicia of actual alterations of documents are numerous."

In view of the inadequate and spurious evidence offered in support of the application, it is clear that the Commission's decision rests upon a "rational basis" and should not be disturbed upon judicial review. *Mississippi Valley Barge Line Company* v. *United States,* 292 U. S. 282, 286–7; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146.

That applicant's evidence was not credible and convincing appears plainly from the review of typical instances discussed in the District Court's opinion. The Commission's report likewise contains a careful analysis of the record. As the Commission found, the testimony of applicant and his witnesses as to the character and scope of his motor carrier operations during the critical period is "very general and, on cross-examination, his testimony in the main is evasive." In addition to its inherent weakness, applicant's case was affirmatively discredited by the fact that ser-

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the Commission to determine what weight, if any, shall be given to the testimony is particularly applicable in such cases.

ious discrepancies and alterations of documents were disclosed at the hearings.

It would be superfluous to analyze the record at length for the purpose of elaborating upon the instances where the untrustworthiness of applicant's evidence is revealed. The illustrative examples contained in the opinion of the District Court and in the Commission's report are sufficient to show that the Commission was exercising its sound discretion in denying appellant's application.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the decree of the District Court should be affirmed.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JULY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 296. EVANS, TRADING AS OTIS EVANS TRUCK LINE, *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of Virginia. October 14, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 25; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 484, 490; *Mis-*

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sissippi Valley Barge Line Co. v. *United States*, 292 U. S. 282, 286–7. *Rutledge C. Clement* for appellant. *Solicitor General McGrath* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 65 F. Supp. 183.